Filed 10/19/09 In re Mcintyre CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re JONATHAN McINTYRE On Habeas Corpus.	F057057 OPINION (Super. Ct. No. 1049923

APPEAL from on Order Granting a Petition for Writ of Habeas Corpus. Susan D. Siefkin, Judge.

Michael Satris, under appointment by the Court of Appeal, for Respondent.

Edmund G. Brown, Jr., Attorney General, Julie L. Garland, Senior Assistant Attorney General, Jennifer A. Neill and Amy Daniel, Deputy Attorneys General, for Appellant.

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Respondent Jonathan McIntyre is an inmate serving a 25 years-to-life sentence for the December 1, 1981 first degree murder of John Byron Crahan. On February 26, 2008, appellant Board of Parole Hearings (Board) found McIntyre unsuitable for parole. On August 21, 2008, the California Supreme Court decided *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*) and *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis*), explaining the "some evidence" standard of judicial review of Board rulings in parole hearings. On September 10, 2008, McIntyre filed a petition for writ of habeas corpus in the Stanislaus County Superior Court challenging the Board's decision to deny parole and contending that the Board's decision was inconsistent with the holdings of *Lawrence* and

Shaputis. The superior court granted McIntyre's petition for writ of habeas corpus. The superior court found that the Board's decision was not supported by "some evidence," as that standard is explained in *Lawrence* and *Shaputis*. It ordered the "Board to hold a new hearing within thirty (30) days of the finality of [its] decision, and to find [McIntyre] suitable for parole unless *new evidence* of [McIntyre's] conduct and/or mental health *subsequent to the February 26, 2008 parole hearing* is introduced and provides 'some evidence' that [McIntyre] currently poses an unreasonable risk of danger to the public."

The Board appealed from the superior court's decision. The Board contends that its decision to deny parole to McIntyre is supported by some evidence, and that even if it is not, the court erred in restricting the Board to consideration of post-February 26, 2008 evidence of McIntyre's suitability or unsuitability for parole. As we shall explain, we agree with the Board's second contention. We will reverse the superior court's order and will direct that court to remand the matter to the Board with instructions to hold a new parole hearing at which evidence of McIntyre's suitability or unsuitability for parole is not restricted to post-February 26, 2008 evidence, and at which the Board will determine McIntyre's parole suitability in accordance with the views expressed in *Lawrence* and *Shaputis*.

FACTS

The Life Term Offense

McIntyre was 18 years old when he and 19-year-old Stoney Hunt, 17-year-old Chuck Earl, and 17-year-old Jack Britt attempted to kidnap John Crahan, a 51-year-old high school teacher, and hold him for ransom. Hunt was a former student of Crahan, and had done yard work for Crahan at Crahan's home. Hunt's brother-in-law had overheard Hunt, Earl and McIntyre planning the kidnapping and had tipped Crahan off about it. When the four teenagers went to Crahan's house at about 6:00 a.m. on December 1, 1981 to kidnap him, Crahan was armed and waiting for them. The teenagers had two handguns of their own that had been supplied by Earl. Britt was carrying one of them. McIntyre

initially had the other, but gave it to Hunt. Crahan fired at McIntyre as McIntyre was standing near Crahan's garage. Britt, who was hiding behind Crahan's truck in the driveway, shot Crahan in the chest. Crahan fell in his driveway and died. In April of 1982 a jury found McIntyre guilty of first degree murder, attempted kidnapping, and also of conspiring to kidnap Crahan's 81-year-old mother, who lived with Crahan.

Other Parole Hearing Evidence

McIntyre was born in September of 1963. He had juvenile adjudications in May of 1978 for burglary, in June of 1979 for attempted burglary and two counts of burglary, and in May of 1980 for auto theft and possession of stolen property. His parents divorced when he was 10 years old. His mother remained in Arizona and his father moved to Modesto, California. McIntyre's 1978 adjudication for burglary was in Arizona. The other juvenile adjudications were in Stanislaus County, California. McIntyre now has a good relationship with his father and plans to live with his father and stepmother. His mother now lives in Texas and he stays in contact with her.

McIntyre married while in prison in 1987. His wife lives in San Luis Obispo. They have a 17-year-old son. McIntyre and his wife are "separated" and have been "separated now for, like, 14 years." He has been totally disciplinary-free in prison since 1989. His prison record includes nine "115's," the last in 1989 for receiving a package for another inmate, and six "128's," the last in 1984.[1] He has had no violence-based violations throughout his 25 years of incarceration. He has successfully performed various prison jobs, and at the time of the February 2008 parole hearing was the "lead clerk in the main kitchen." He has completed various self-help programs, including a "Cage Your Rage" program and an "Impact Program." He is part American-Indian and

[1] California Department of Corrections (CDC) Form 115 is used to document serious misconduct and misconduct that is believed to violate the law. (CDC Form 128-A is used to document minor misconduct. (Cal.Code Regs., tit. 15, § 3312, subds. (a)(2) & (a)(3).)

became involved with a "Native American Indian religious group." He has acted as an "inmate peer educator" on various health education programs. He dropped out of high school after the 11th grade, but earned a GED in 1983 while incarcerated. College courses are offered at Soledad prison through videos shown on the prison's television, and McIntyre has taken six courses from Coastline Community College and seeks to earn an associate's degree. Several prison employees submitted letters and positive "chromos" on his behalf. They tout his many years of disciplinary-free behavior, his positive attitude, his excellent work ethic and his efforts to better himself.

A January 2008 psychological report stated: "Various clinical factors ... provide an overall risk assessment estimate which suggests that the inmate poses a moderate to low likelihood of becoming involved in a violent offense if released into the free community." McIntyre does not have a substance abuse diagnosis and "does not appear to suffer from a major mental illness." The report did note, however, that "given the past pattern of delinquent behavior as an adolescent, including juvenile criminal conduct, an adult criminal history including the life crime, and ongoing difficulties early in his incarceration, the inmate appears to meet criteria for a diagnosis of Antisocial Personality Disorder" and "[r]esearch has shown that individuals with such a diagnosis are at an increased risk of reoffending."

A deputy district attorney from Stanislaus County appeared at the February 2008 parole hearing and argued against the granting of parole. She pointed out that when McIntyre gave a statement to a probation officer in April of 1982, McIntyre admitted that both he and Britt were in possession of guns when Crahan was shot. This was different than the story McIntyre told at the February 2008 parole hearing, where he stated that he had already returned the gun to Hunt before the fatal shooting. The deputy district attorney argued "I don't think that he's accepted full responsibility for his actions in the commitment offense."

The Board's Decision

The Board's decision to deny parole relied heavily on the facts of the commitment offense. The Presiding Commissioner noted that the offense "was carried out in an especially cruel, very callous manner," and recounted in detail the facts of the crime. The "next reason for the denial" was McIntyre's "criminal history," which consisted of the above-mentioned juvenile adjudications. The Presiding Commissioner noted that there were "no adult convictions" other than the ones stemming from the December 1, 1981 incident. Third, the Presiding Commissioner stated that McIntyre "has not sufficiently participated in beneficial self-help." Two of McIntyre's 1985 "115's" were for possession of inmate-manufactured alcohol and for being under the influence. McIntyre stated at his parole hearing that back then he manufactured "pruno" (inmate manufactured wine) to be "cool" and "in" with other inmates, and "would drink it on occasion." He participated in Alcoholics Anonymous for about four years from 1998 to 2002, but then dropped it because it conflicted with his Wednesday night college class. McIntyre had used marijuana as a teenager, and also participated in Narcotics Anonymous for some period of time while in prison. The Presiding Commissioner told McIntyre "you certainly do need further self-help and certainly to continue on with your substance abuse programming." Fourth, the Commissioner pointed out that the psychological report "is not totally supportive of release." The Presiding Commissioner specifically mentioned that McIntyre's past behavior was consistent with a diagnosis of antisocial personality disorder.

DISCUSSION

I.

Statutory and regulatory framework governing parole decisions.

Under the current sentencing law, offenders convicted of noncapital murder are subject to indeterminate sentences. They may serve up to life imprisonment, but become

eligible for parole after serving minimum terms of confinement. (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1078 (*Dannenberg*).) In the case of an inmate sentenced to life in prison, a panel of commissioners of the Board meets with the inmate and sets a parole release date one year prior to an inmate's minimum eligible parole release date unless it determines that public safety requires a lengthier period of incarceration. (Pen. Code, §3041, subds. (a) & (b).)[2] "Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison." (Cal. Code Regs., tit. 15, § 2402, subd. (a).)

In determining suitability for parole, the Board must consider factors specified by regulation. (Cal. Code Regs., tit. 15, § 2402.) Parole considerations applicable to life prisoners convicted of murder are contained in California Code of Regulations, title 15, section 2400 et seq.

Factors tending to establish unsuitability for parole include that the inmate: (1) committed the offense in an especially heinous, atrocious, or cruel manner; (2) has a previous record of violence; (3) has an unstable social history; (4) has sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison or jail. (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)-(6).)

Factors tending to show suitability for parole include that the inmate: (1) does not have a juvenile record of assaulting others or committing crimes with the potential of personal harm to victims; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his or her life, especially if the stress built up over a long period; (5) committed the crime as a result of Battered Woman Syndrome; (6) lacks any significant history of violent crime; (7) is of an age that

[2] Unless otherwise specified all statutory references are to the Penal Code.

reduces the probability of recidivism; (8) has made realistic plans for release, or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities suggesting an enhanced ability to function within the law upon release. (Cal. Code Regs., tit. 15, § 2402, subd. (d)(1)-(9).)

These factors are only general guidelines and the Board must consider all reliable, relevant information available to it when determining parole suitability. (Cal. Code Regs., tit. 15, § 2402, subd. (b).) The paramount consideration for both the Board and the Governor when determining parole suitability is public safety. This requires an assessment of the inmate's current dangerousness. (*Lawrence, supra*, 44 Cal.4th at p. 1205; *Shaputis, supra*, 44 Cal.4th at p. 1254.)

The Governor has authority pursuant to subdivision (b) of section 8 of article V of the California Constitution to affirm, modify or reverse the Board's parole decision. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 660 (*Rosenkrantz*).) The statutory procedure guiding the Governor's review of a parole decision of an inmate sentenced to an indeterminate term based upon a murder conviction is contained in section 3041.2. The Governor possesses substantial discretion to weigh the relevant factors involving an inmate's history and rehabilitation in deciding whether the inmate is suitable for parole. The Governor undertakes an independent, de novo review of the inmate's suitability for parole based on the record that was before the Board. The Governor may be more stringent or cautious in determining whether an inmate poses an unreasonable risk to public safety. (*Shaputis, supra*, 44 Cal.4th at p. 1258.) The Governor's and the Board's parole decisions are based on the same factors and same evidentiary record. (*Rosenkrantz, supra*, 29 Cal.4th at p. 661.)

Appellate courts review the decision of the Board and the Governor to ensure that they are consistent with the applicable legal standards and to assess whether they are supported by some evidence in the record. (*Rosenkrantz, supra*, 29 Cal.4th at pp. 658-661.)

II.

The Board's decision was methodologically flawed and the matter must be remanded for reconsideration of petitioner's current dangerousness.

A. In February 2008, there was a split in appellate decisions.

When the Board denied parole in this matter, the issue of whether the aggravated circumstances of the commitment offense alone can justify the denial of parole was unsettled. Appellate courts were split on this issue. Some cases presumed that the egregiousness of the commitment offense could support the ultimate determination that the inmate posed a threat to public safety. Inherent in this approach was the assumption that evidence establishing that a commitment offense was particularly egregious inherently assesses the threat currently posed by the inmate to public safety. Conversely, other cases concluded that the applicable inquiry is whether the inmate continues to be currently dangerous and not merely whether the record contains evidence of unsuitability such as the egregiousness of the commitment offense. (*Lawrence, supra*, 44 Cal.4th at pp. 1206-1210.) Thus, a conflict emerged "as to whether the aggravated circumstances of the commitment offense, standing alone, provide some evidence that the inmate remains a current threat to public safety." (*Lawrence, supra*, 44 Cal.4th at p. 1206.) The appellate court opinions centered upon the precise contours of the some evidence standard of review and the extent to which a determination of current dangerousness should guide a court's review of the Board's or the Governor's decision. Yet, as a result of this conflict, the Board and the Governor were left with contradictory guidance on the methodology they were to apply in fulfilling their statutory and regulatory mandates.

B. *Lawrence/Shaputis* resolved this conflict.

In August of 2008, our Supreme Court resolved this conflict as part of its decisions in *Lawrence* and *Shaputis*.[3] In relevant part, the high court explained, "In

[3] Review was granted in *Lawrence* and *Shaputis* "to resolve a conflict among the Courts of Appeal regarding the proper scope of the deferential 'some evidence' standard of

Dannenberg, we confirmed that '[w]hen the Board bases unsuitability on the circumstances of the commitment offense, it must cite "some evidence" of aggravating facts *beyond the minimum elements of that offense*. [Citation.]' [Citation.]" (*Lawrence*, *supra*, 44 Cal.4th at p. 1207.) In attempting to apply *Dannenberg*, the split in the appellate courts described above occurred. *Lawrence* concluded that the minimum elements inquiry has resulted in arbitrary results and is unworkable in practice, partly because few murders could not be characterized as particularly aggravated or as involving some act beyond the minimum required for conviction of the offense. (*Lawrence, supra,* 44 Cal.4th at p. 1218.) Also, the minimum elements inquiry substantially undermines the rehabilitative goals of the governing statutes by functionally removing consideration of relevant suitability factors and failing to assess current dangerousness. (*Id*. at p. 1220.)

Lawrence explained that "the determination whether an inmate poses a current danger is not dependent upon whether his or her commitment offense is more or less egregious than other, similar crimes" or "dependent solely upon whether the circumstances of the offense exhibit viciousness above the minimum elements required for conviction of that offense." (*Lawrence, supra*, 44 Cal.4th at p. 1221.) The applicable "inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense." (*Ibid*.) The Board or the Governor may deny parole based upon the circumstances of the offense or other immutable facts such as an inmate's criminal history "*only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. [Citation.]" (*Ibid*.) Current dangerousness, rather than the mere presence of statutory unsuitability factors, is the focus of the parole decision. (*Id*. at p. 1210.)

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review set forth in [*Rosenkrantz*], and thereafter applied in [*Dannenberg*]." (*Shaputis, supra,* 44 Cal.4th at p. 1254.)

The predictive value of the commitment offense to the assessment of current dangerousness generally decreases over time. *Lawrence* cautioned "that certain conviction offenses may be so 'heinous, atrocious or cruel' that an inmate's due process rights would not be violated if he or she were to be denied parole on the basis that the gravity of the conviction offense establishes current dangerousness." (*Lawrence, supra,* 44 Cal.4th at p. 1228.) However, in many cases evidence suggesting that the murder was heinous or egregious will not eternally support decision that the inmate is unsuitable for parole. (*Id*. at p. 1226.)

> "When, as here, all of the information in a postconviction record supports the determination that the inmate is rehabilitated and no longer poses a danger to public safety, and the Governor has neither disputed the petitioner's rehabilitative gains nor, importantly, related the commitment offense to current circumstances or suggested that any further rehabilitation might change the ultimate decision that petitioner remains a danger, mere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability." (*Id*. at pp. 1226-1227.)

Shaputis reiterated this principle. It explained that the determination whether an inmate poses a current danger is not dependent solely upon whether the circumstances of the offense exhibit viciousness above the minimum elements required for conviction. (*Shaputis, supra*, 44 Cal.4th at p. 1254.)

> "Rather, the relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense. This inquiry is, by necessity and by statutory mandate, an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude. [Citation.]' [Citation.]" (*Id.* at pp. 1254-1255.)

Recently, *In re Criscione* (2009) 173 Cal.App.4th 60 (*Criscione*) explained, "As *Lawrence* clarified, however, due consideration 'requires more than rote recitation of the

relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision -- the determination of current dangerousness.' [Citation.]" (*Id*. at pp. 74-75.)

C. We cannot presume that the Board applied the proper legal standard and it is apparent that it used a flawed methodology when assessing petitioner's parole suitability.

The record in this case demonstrates that the Board utilized a flawed methodology when assessing petitioner's suitability for parole. It heavily relied on the calculated, cold-blooded and callous circumstances of the commitment offense in deciding to deny parole. There is no indication in the Board's oral remarks or written ruling that it considered whether there was a rational nexus between the immutable factor[4] of the commitment offense and petitioner's current dangerousness. The Board focused on the facts of the commitment offense and did not assess whether those facts continue to have predictive value in light of petitioner's institutional behavior, age, and other factors. The Board did not articulate any rational nexus between this immutable factor and petitioner's current dangerousness. In sum, it identified and focused on the immutable factor of the circumstances of the murder to determine that petitioner was unsuitable for parole but it failed to relate this factor to circumstances that would make it continue to be probative of petitioner's current dangerousness.

In re Katrina C. (1988) 201 Cal.App.3d 540 (*Katrina C*.) is instructive. "*Katrina C*. involved a dispositional order transferring custody from one parent to the other, which order issued shortly after the effective date of revision to [Welfare and Institutions Code] section 361 making clear that the higher standard of proof applied." (*In re Misako R.* (1991) 2 Cal.App.4th 538, 548.) The appellate court concluded that it

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[4] The inmate's commitment offense has been characterized by the courts as an "immutable factor" because, along with the prisoner's previous criminal history and record of violence, it is a circumstance that the inmate cannot change. (*In re Scott* (2005) 133 Cal.App.4th 573, 594-595.)

could apply the ordinary presumption that the trial court had applied the correct legal standard because the record was silent and "[c]onfusion in this area was engendered by an apparent blurring in case law, including one case decided by this court [citation], between the jurisdictional finding and the dispositional order in dependency cases. [Citation.]" (*Katrina C., supra*, 201 Cal.App.3d at p. 548.) It remanded the matter to the juvenile court for express articulation of the standard of proof it had applied. If the juvenile court had not applied the clear and convincing standard of proof, it was directed to conduct another dispositional hearing. (*Id.* at p. 550.)

The situation before us is analogous to *Katrina C.* in several respects. Just as in *Katrina C.*, the applicable law was blurred in a key respect when the Board made its parole decision. The law has now been clarified and explicit direction has been provided concerning the methodology the Board is to employ when assessing a petitioner's suitability for parole. Further, it is apparent that in this case the Board did not anticipate the result in *Lawrence* and *Shaputis* and consider whether the immutable circumstances of petitioner's commitment offense and his prior criminal history continue to have predictive value. Rather, the Board simply focused on the presence of suitability and unsuitability factors without considering whether there was a nexus between those factors and petitioner's current dangerousness. The Board applied a flawed methodology in its decision-making process by failing to consider whether there was a rational nexus between the immutable factors and petitioner's current dangerousness. Therefore, since the proper methodology to be used when determining parole suitability was unsettled in February 2008 and the record does not affirmatively demonstrate that the Board applied the correct standard, we conclude that it is not appropriate to apply the ordinary presumption that the Board was aware of and utilized the correct legal standard when assessing petitioner's suitability for parole. Furthermore, we cannot presume that the Board would have reached the same conclusion about petitioner's parole suitability had it done so. (*Katrina C., supra*, 201 Cal.App.3d at p. 548.)

Recently, *Criscione, supra*, 173 Cal.App.4th 60 reached the same conclusion. The appellate court determined that it could not presume that the Board applied the proper evidentiary standard because the parole decision at issue was made prior to issuance of *Lawrence* "and the Board's decision does not clearly indicate that it considered the nexus between the facts upon which it relied and its conclusion that Criscione would present an unreasonable risk to public safety if released." (*Id*. at p. 77.) It reasoned:

> [¶] "Where the standard of proof has been long settled, and absent a statement to the contrary, we ordinarily presume on appeal that a trial court applied the appropriate evidentiary standard. [Citation.] We would apply a similar presumption to decisions of the Board but the law pertaining to the parole decision has not been long settled. Until *Lawrence*, some reviewing courts assumed that a parole denial based simply upon evidence that the commitment offense was particularly heinous, atrocious, or cruel [citation] comported with due process, so long as the Board indicated it considered the other regulatory factors. [Citation.] As *Lawrence* clarified, however, due consideration 'requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision -- the determination of current dangerousness.' [Citation.] In the present case, although the Board recited its conclusion that Criscione would pose an unreasonable risk of danger to society or a threat to public safety if released from prison, the Board did not articulate any nexus between the factors upon which it relied and its ultimate conclusion." (*Criscione, supra,* 173 Cal.App.4th at pp. 74-75.)

Further:

> [¶] "… the Board did not have benefit of *Lawrence* and *Shaputis* and the Board's decision does not clearly indicate that it considered the nexus between the facts upon which it relied and its conclusion that Criscione would present an unreasonable risk to public safety if released. In these circumstances, we cannot presume that the Board applied the evidentiary standard as clarified by *Lawrence* or that it would have reached the same conclusion had it done so. Accordingly, remand is warranted." (*Criscione, supra,* 173 Cal.App.4th at p. 77.)

D. The proper remedy is to direct the superior court remand to the Board to allow it to apply the standard explained and clarified in *Lawrence* and *Shaputis*.

In determining the appropriate remedy, we are principally guided by *In re Ramirez* (2001) 94 Cal.App.4th 549. "In *Ramirez*, the appellate court concluded the Board of Prison Terms had erred by failing to consider the proportionality of an inmate's sentence in relation to the determinate term prescribed for his crimes, or the gravity of his offenses as compared with other similar offenses. [Citation.]" (*In re Rico* (2009) 171 Cal.App.4th 659, 687, fn. omitted (*Rico*).) *Ramirez* also concluded that the trial court erred by making its own evaluation of the evidence before the Board and by ordering the Board to set a parole date. *Ramirez* explained, "In deference to the Board's broad discretion over parole suitability decisions, courts should refrain from reweighing the evidence, and should be reluctant to direct a particular result. [Citation.] The Board must be given every opportunity to lawfully exercise its discretion over Ramirez's parole application." (*Ramirez, supra*, 94 Cal.App.4th at p. 572.) Therefore, it reversed the trial court's order and directed the Board to conduct another parole suitability hearing conforming to specific legal guidelines. (*Ibid.*) Although the proportionality aspects of the *Ramirez* decision were later disapproved by *Dannenberg, supra*, 34 Cal.4th at pages 1070-1071, the remedy was not.

Ramirez's conclusion that the Board must be given every opportunity to lawfully exercise its discretion over the parole decision is persuasive and the remedy it crafted is applicable where, as in this case, the Board's decision was based upon a flawed methodology. (See, e.g., *Rico, supra,* 171 Cal.App.4th at p. 688.)

When, as here, the Board or the Governor made the parole suitability decision prior to issuance of *Lawrence* and relied in substantial part on immutable factors, we believe that the appropriate remedy is to remand for reconsideration so that the Board can exercise its discretion in this matter after assessing the petitioner's parole suitability using

the proper methodology and correct standard as explained and clarified in *Lawrence* and *Shaputis*.

Criscione, supra, 173 Cal.App.4th 60 agrees with this reasoning and result. In relevant part, *Criscione* concluded, "Since *Lawrenc*e was not decided until after the proceedings from which this appeal is taken, and since our independent review of the record suggests that the Board did not adhere to the evidentiary standard *Lawrence* described, we shall remand the matter to the Board for rehearing in light of this clarifying law." (*Id*. at p. 65.) Some other published decisions also have concluded that remand for reconsideration in light of *Lawrence* and *Shaputis* is the appropriate remedy for various errors. (See *In re Ross* (2009) 170 Cal.App.4th 1490 [record contained some evidence of dangerousness but remand for reconsideration was necessary because the Governor's decision did not expressly articulate a nexus between commitment offense and current dangerousness]; *In re Lazor* (2009) 172 Cal.App.4th 1185 [Board's decision failed to identify some evidence of current dangerousness; proper remedy is to remand for reconsideration].)

E. The separation of powers doctrine precludes us from assessing whether the Board's February 2008 decision is supported by some evidence.

Appellant argues against remand for a new parole suitability hearing to assess petitioner's current dangerousness under the standard explained and clarified in *Lawrence* and *Shaputis*. Appellant urges us to review the Board's February 2008 decision for the existence or nonexistence of some evidence and then grant or deny direct relief as appropriate, relying on some recent appellate court decisions that have followed this course. (See, e.g., *In re Aguilar* (2008) 168 Cal.App.4th 1479; *In re Burdan* (2008) 169 Cal.App.4th 18; *In re Vasquez* (2009) 170 Cal.App.4th 370; *Rico, supra*, 171 Cal.App.4th 659.)

We are not convinced that this is the prudent course. If we were to assess the Board's February 2008 decision denying parole for the existence of some evidence under

the standard clarified in *Lawrence* and then fashion relief based on our conclusion, we would effectively be precluding the Board from making the initial determination of petitioner's current dangerousness using the correct methodology and proper legal standard. This runs a serious risk of violating the separation of powers doctrine.

In re Lugo (2008) 164 Cal.App.4th 1522 (*Lugo*), explains the separation of powers doctrine, as follows:

> [¶] "The separation of powers principle is embodied in the California Constitution, which provides as follows in Article III, section 3: 'The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.' '"The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch. [Citations.]" [Citation.]' [Citation.] Although the doctrine is not intended to prohibit one branch from taking action that might affect those of another branch, the doctrine is violated when the actions of one branch 'defeat or materially impair the inherent functions of another branch. [Citation.]' [Citation.] Intrusions by the judiciary into the executive branch's realm of parole matters may violate the separation of powers. [Citation.]" (*Id*. at p. 1538.)

The judicial branch has a limited and carefully circumscribed duty to review parole decisions. "The Board's discretion in parole-related matters has been described as 'great' and 'almost unlimited.' [Citation.] Nevertheless, the requirement of procedural due process places some limitations upon the broad discretionary powers of the Board. [Citation.]" (*Lugo, supra,* 164 Cal.App.4th at p. 1537; *Rosenkrantz, supra*, 29 Cal.4th at p. 667.) Whether reviewing a decision by the Board or reviewing the Governor's exercise of his power under article V, section 8, subdivision (b) of the California Constitution, the applicability of the highly-deferential some evidence standard of review is rooted in principles of separation of powers. (*Rosenkrantz, supra*, 29 Cal.4th at pp. 652-667.) "The executive branch has 'inherent and primary authority' over parole matters. [Citation.] Within that branch, the Board is an 'executive parole agency' that is an 'arm of the Department of Corrections.' [Citations.]" (*In re Roberts* (2005) 36

Cal.4th 575, 588, fn. omitted.) "By its nature, the determination whether a prisoner should be released on parole is generally regarded as an executive branch decision. [Citations.] The decision, and the discretion implicit in it, are expressly committed to the executive branch. [Citations.] It is not a judicial decision. [Citations.]" (*In re Morrall* (2002) 102 Cal.App.4th 280, 287.)

We must be vigilant to ensure that our judicial review of a parole decision is carefully exercised so that it does not violate the separation of powers by intruding upon the executive branch's broad discretion in parole-related matters. (See, e.g., *Lugo, supra*, 164 Cal.App.4th 1522 [order requiring Board to state a significant change in circumstances justifying decision to deny parole for more than one year following a prior one-year parole denial violated separation of powers doctrine]; *Hornung v. Superior Court* (2000) 81 Cal.App.4th 1095, 1099 [court order allowing inmate to question commissions about their parole-related decision process violated separation of powers]; *In re Masoner* (2009) 172 Cal.App.4th 1098 [trial court's order directing inmate's release violated separation of powers because Board must be given opportunity to determine if new evidence of his conduct or change in his mental state support a determination that he is currently dangerous].)

We believe that the separation of powers doctrine requires the Board and the Governor to first assess the evidence in this case and determine if petitioner is currently dangerous under the standard explained and clarified in *Lawrence* and *Shaputis*. Once the initial determination of current dangerousness has been made by the executive branch, then it is proper for this court to review the factual basis of this decision under the deferential some evidence standard. (*Rosenkrantz, supra*, 29 Cal.4th at p. 658.) To determine *at this point* whether there is some evidence of current dangerousness under the standard explained and clarified in *Lawrence* and *Shaputis* would essentially place this court in the position of acting as the initial fact-finder, thereby usurping the proper role of the Board and the Governor. It would effectively preclude the executive branch's

exercise of discretion in this matter. To protect the separation of powers, we believe that the executive branch should be the first to decide the ultimate question of whether petitioner is currently dangerous under the standard clarified in *Lawrence*, not the courts.

DISPOSITION

The superior court's order of January 30, 2009 and its clarifying order of February 18, 2009 are reversed. The superior court is directed to enter a new and different order directing the Board to conduct a new parole hearing within 90 days to consider petitioner's parole suitability in accordance with the views expressed and explained in *Lawrence* and *Shaputis*. At this hearing the Board may consider both the evidence presented at the February 26, 2008 parole hearing as well as any new evidence pertaining to McIntyre's suitability for parole.

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Ardaiz, P. J.

WE CONCUR:

_____
Wiseman, J.

_____
Gomes, J.